Supreme Court, U. S.
FILED
MAR 8 1978
MICHAEL RODAK, JR., CLERK

No. 77-990

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH J.C. DiCARLO AND RONALD C. MacKENZIE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

SIDNEY M. GLAZER,
ELLIOTT SCHULDER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

Page

Opinion below 1

Jurisdiction 1

Question presented 1

Constitutional provisions and rule involved 2

Statement 3

Argument 9

Conclusion 15

CITATIONS

Cases:

Cady v. *Dombrowski*, 413 U.S. 433 10

Doe v. *McMillan*, 412 U.S. 306 11

Elkins v. *United States*, 364 U.S. 206 10

Grand Jury Proceedings, In re, 563 F. 2d 577 13

Gravel v. *United States*, 408 U.S. 606 ..... 10, 11

Imbler v. *Pachtman*, 424 U.S. 409 ..... 12, 13

Ker v. *California*, 374 U.S. 23 10

National League of Cities v. *Usery*, 426 U.S. 833 11

O'Shea v. *Littleton*, 414 U.S. 488 ..... 11, 13

Tenney v. *Brandhove*, 341 U.S. 367 11

United States v. *Anzelmo*, 319 F. Supp. 1106 12

United States v. *Brewster*, 408 U.S. 501 ..... 9, 10, 11, 12

Page

Cases—(continued):

United States v. *Craig*, 528 F. 2d 773, adopted *en banc*, 537 F. 2d 957, certiorari denied *sub nom. Markert* v. *United States*, 429 U.S. 999 ..... 9, 10, 13

United States v. *Gillock*, 559 F. 2d 1222 14

United States v. *Johnson*, 383 U.S. 169 10

Constitution, statutes, and rules:

United States Constitution:

Article I, Section 6, clause 1 (Speech or Debate Clause) 2, 8, 9

Article VI, Section 2 (Supremacy Clause) 2, 10-11

Massachusetts Constitution:

Article XXI 2

18 U.S.C. 371 3

18 U.S.C. 1951 3

18 U.S.C. 1952 3

Federal Rules of Evidence 103(a)(1) 9

Federal Rules of Evidence 402 10

Federal Rules of Evidence 501 2-3

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-990

JOSEPH J.C. DiCARLO AND RONALD C. MacKENZIE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 565 F. 2d 802.

JURISDICTION

The judgment of the court of appeals was entered on November 11, 1977. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including January 10, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a state legislator has a privilege that precludes the introduction of evidence of his legislative acts in a federal criminal prosecution.

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

The Speech or Debate Clause of the United States Constitution, Article I, Section 6, clause 1, provides in part:

> The Senators and Representatives * * * shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

The Supremacy Clause of the United States Constitution, Article VI, Section 2, provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article XXI of the Massachusetts Constitution provides:

> The freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.

Rule 501 of the Federal Rules of Evidence provides in part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. * * *

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioners, former members of the Massachusetts Senate, were convicted of extortion affecting interstate commerce, in violation of the Hobbs Act, 18 U.S.C. 1951; of using the facilities of interstate commerce for the distribution of the proceeds of an unlawful activity, in violation of the Travel Act, 18 U.S.C. 1952; and of conspiring to commit those crimes, in violation of 18 U.S.C. 1951 and 18 U.S.C. 371. Each petitioner was sentenced to concurrent terms of two years' imprisonment, execution of which was suspended, and fined $5,000 on the conspiracy counts; in addition, each was sentenced to concurrent terms of one year's imprisonment on the substantive counts (R. 2153-2154).[1]

The charges were based on efforts by the petitioners to extort $40,000 from the New York construction management firm of McKee-Berger-Mansueto, Inc. ("MBM"). MBM had been selected in 1969 by the Massachusetts Executive Office for Administration and Finance to oversee the construction of a new campus of the University of Massachusetts in Boston (R. 1996-2039). In February 1971, while MBM was performing its work on

---

[1] "R." refers to the "Consolidated Record to Briefs" filed in the court of appeals.

the contract, several newspaper articles appeared criticizing the way in which MBM's contract had been awarded and performed (R. 189-192).[2] After the publication of these articles, petitioner DiCarlo and two other Massachusetts legislators proposed a legislative order calling for an investigation and report on all aspects of MBM's contract with the Commonwealth (R. 192, 1924-1927).

In response to the newspaper's allegations and the proposed investigative order, Gerald McKee, MBM's president, prepared a letter rebutting the charges of impropriety. McKee went to petitioner DiCarlo's home, at the latter's invitation, on February 18, 1971, to deliver a copy of the letter and explain MBM's position (R. 201-205, 494-495, 499-500, 514). McKee testified that when he attempted to discuss in detail the allegations in the newspaper articles, petitioner DiCarlo interrupted him and stated (R. 210; see also R. 504-507):

> You are very naive about matters in Boston, Mr. McKee, I don't care what the merits of the matter are, the investigation is going to go forward. It's going to go forward because the contract was signed by Donald R. Dwight [former Commissioner of Administration and Finance], and someday he is going to be an opponent, perhaps of mine, in a contest for the governorship of Massachusetts, and that is the important issue to me. Anything I can do to damage him or to earn political points vis-a-vis Mr. Dwight, I am going to do, and the facts are not

[2]The articles, which suggested that the contract had been obtained through illegal or improper means, were written without any effort to verify the facts with representatives of MBM or the Commonwealth agency responsible for soliciting contract applications (R. 194-199, 471, 1406-1407, 1413).

> going to persuade me away from it, and if it damages your firm that, is too bad. Those are the facts of life in Boston, and it's time you learned them.

McKee testified that petitioner DiCarlo stated that he should not have met with McKee, that he would deny having had the meeting, and that the next time they would see each other would be across an investigating table (R. 210-211).

McKee became concerned that MBM would not receive a fair hearing in the legislative investigation (R. 213). McKee asked MBM vice president Anthony Mansueto to discuss MBM's prospects with Massachusetts Senator James Kelly, who was then Chairman of the Senate Ways and Means Committee (R. 536-541).[3] Senator Kelly indicated that he was aware of the meeting that had taken place at petitioner DiCarlo's home (R. 564). At Kelly's suggestion, Mansueto agreed to meet Kelly the following month in Florida for further discussions (R. 565).

When they met in Florida, Kelly informed Mansueto that he had spoken to petitioner DiCarlo, that DiCarlo was underpaid and had two children to put through school, and that although DiCarlo was principally concerned with harming Mr. Dwight, "this whole thing could be taken care of and a favorable report written" if a payment of $100,000 were made to petitioner DiCarlo (R. 572-573). Mansueto and McKee refused to make any payments (R. 253, 573-574, 579-580), even though they feared that the investigation would be biased against MBM (R. 256).[4] A week later, Kelly's committee

[3]Action on the investigative order was pending before Senator Kelly's committee (R. 146).

[4]The jury was instructed that the evidence of Kelly's statements was to be considered only to the extent that they bore on the states of mind of McKee and Mansueto (R. 245-246, 572).

recommended that the investigative order be adopted (R. 146, 1932-1933).

On March 29, 1971, a legislative committee was formed to conduct the investigation, with petitioner DiCarlo as its chairman (R. 147, 257). A public hearing was held, at which petitioner DiCarlo presided and McKee testified (R. 257-258). McKee was concerned, on the basis of petitioner DiCarlo's questions, that the committee report would reach conclusions unfavorable to MBM and would recommend termination of MBM's contract (R. 260, 262-264).

In September 1971, more than one month after the final hearing, McKee had an employee, William Harding, speak to petitioner MacKenzie in order to ascertain the status of the investigation (R. 808). Petitioner MacKenzie was not a member of the investigative committee, but he said that he knew petitioner DiCarlo quite well (R. 813). A few days later, petitioner MacKenzie informed Harding that he had seen the forthcoming report, that "it didn't appear too damaging" (R. 811), but that favorable changes might be made in the report for "a considerable contribution * * * possibly $30,000 or $40,000" (R. 812).

McKee and Mansueto decided to pay the money (R. 585-586). MBM paid petitioner MacKenzie $40,000 in five seperate installments between October 11, 1971, and May 12, 1972 (Pet. App. 3a).

After the initial payment had been made, petitioner MacKenzie gave Harding a draft copy of the legislative report (R. 292-294, 801-802, 1058). After reviewing the report, McKee remained apprehensive that the final version might recommend termination of MBM's contract (R. 299). Accordingly, McKee prepared a memorandum

summarizing MBM's performance under the contract and delivered the memorandum to MacKenzie via Harding (R. 300, 723, 726-727, 843-844, 949-951, 954, 2058, 2059). The final draft of the committee's report incorporated language almost identical to McKee's memorandum (R. 321, 326, 1988-1989, 1995).

During late 1971 MBM received urgent reminders from petitioner MacKenzie that portions of the $40,000 payment were overdue. Petitioner MacKenzie mentioned on at least two occasions that he was acting under considerable pressure from petitioner DiCarlo (R. 328, 1077). It was shown at trial, over petitioner DiCarlo's objection on the ground of legislative privilege,[5] that the progress of the investigative order through the Massachusetts legislature roughly coincided with MBM's payments to petitioner MacKenzie (Pet. App. 4a). On May 23, 1972, eleven days after the final payment was made, the committee's report—containing McKee's language and recommending no legislative action—was filed in the legislature (R. 148, 362).

On July 6, 1972, several weeks after the filing of the report, petitioners appeared together at McKee's office in New York (R. 362-363). McKee testified that petitioner DiCarlo, complaining that McKee had been late in his payments, stated (R. 364):

> You have made us chase you like creditors, and you shouldn't have done that. It was unnecessary and embarrassing to make us pursue you this way for the payments. The program of payments should have been completed a long time ago. You really took a risk in conducting yourself in this way. The outcome

---

[5]Petitioner MacKenzie did not preserve an objection based on legislative privilege (Pet. App. 4a n. 1).

> of the investigation in the report might have been very different than it had been. I might have taken a different tact [*sic*] because of the late payments.

According to the testimony, Petitioner DiCarlo added that McKee did not realize the difficulties involved in producing the final report and that it had been necessary for DiCarlo to share the money with others (R. 364). Petitioner DiCarlo concluded the meeting by expressing the hope that he might be able to assist MBM in its future activities in Boston, but that "failure to pay promptly would be intolerable" (R. 365).

The court of appeals rejected petitioner DiCarlo's claims of legislative privilege.[6] The court held that the Speech or Debate Clause of the United States Constitution does not protect state legislators (Pet. App. 6a), and that, although the common law doctrine of "official immunity" shields legislators from civil liability in federal courts for their official acts, that doctrine does not apply in criminal cases (*id.* at 7a). Responding to petitioners' argument that principles of federalism require special protection for state legislators, the court stated "that the federal-state relationship [does not] override[ ] the government's need of evidence of federal crime" (*id.* at 8a).

---

[6]Petitioner MacKenzie's claim on appeal was that his conviction was invalid if petitioner DiCarlo was improperly convicted. The court of appeals did not reach petitioner MacKenzie's claim (Pet. App. 2a).

ARGUMENT

Petitioner DiCarlo claims the benefit of a "legislative privilege," which, he contends (Pet. 21-39), required the exclusion at his trial of any evidence relating to his legislative actions and motives.[7]

1. At the outset, it is clear that the Speech or Debate Clause of the United States Constitution applies only to federal legislators, and it offers no support to petitioner (Pet. App. 6a). See *United States* v. *Craig*, 528 F. 2d 773, 783 (C.A. 7) (Tone, J., concurring), adopted *en banc*, 537 F. 2d 957 (C.A. 7), certiorari denied *sub nom. Markert* v. *United States*, 429 U.S. 999. Nor does the privilege

---

[7]Although petitioner MacKenzie asserts (Pet. 14 n. 5) that he also is entitled to the protection of a legislative privilege, he failed to object on this ground at trial (Pet. App. 4a n. 1) and, accordingly, he may not raise this contention now. See Fed. R. Evid. 103(a)(1).

Petitioner MacKenzie's argument that he is protected by a legislative privilege is insubstantial in any event. He contends (Pet. 14 n. 5) that: (1) some unspecified portion of the evidence at trial concerned his actions as "legislative aide" to petitioner DiCarlo, and (2) on the basis of the trial court's instructions to the jury, a finding of his guilt depended on an assessment of petitioner DiCarlo's involvement, which in turn was supported by evidence of DiCarlo's legislative action. But petitioner MacKenzie never advanced at trial the theory that he was acting as petitioner DiCarlo's aide. Moreover, the evidence of petitioner MacKenzie's receipt of $40,000 in cash from MBM and his numerous requests to MBM officials to maintain the schedule of payments were not, by any conceivable interpretation, acts performed as a part of or even incidental to the role of a legislator. See *United States* v. *Brewster*, 408 U.S. 501, 526. Finally, the district court instructed the jury that each defendant must be considered separately in reaching the verdicts and that petitioner MacKenzie could be found guilty of extortion by exploiting MBM's fear of economic loss, or by inducing in MBM's representatives the belief that MacKenzie had influence over DiCarlo (R. 1729-1734, 1752-1754). Petitioner MacKenzie's conviction thus rests on evidence of his own criminal conduct and is not dependent on any proof of his or DiCarlo's legislative acts.

contained in the Massachusetts Constitution determine the admissibility of evidence in the federal courts. See *Cady* v. *Dombrowski*, 413 U.S. 433, 449; *Ker* v. *California*, 374 U.S. 23, 31-33; *Elkins* v. *United States*, 364 U.S. 206, 223-224.[8] Petitioner contends, however, that "constitutional requirements of federalism" (Pet. 25) require federal courts to recognize a speech or debate privilege in federal criminal prosecutions of state legislators.

The "Speech or Debate Clause was designed to assure a *co-equal branch* of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch." *Gravel* v. *United States*, 408 U.S. 606, 616 (emphasis added). It was intended "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary * * *." *Id.* at 617; see also *United States* v. *Brewster*, 408 U.S. 501, 508, 517-518; *United States* v. *Johnson*, 383 U.S. 169, 181; *United States* v. *Craig, supra*, 528 F. 2d at 783. No similar principle of respect for a coordinate branch of government pertains to federal-state relations. The prosecution of state legislators in federal courts for federal crimes carries no risk of affecting the internal balance and separation of powers within the state government. Rather, it preserves the authority of the federal government, established in the Supremacy Clause of the Constitution, to protect the federal interest, "any

[8]See also Fed. R. Evid. 402: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."

Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[9]

State officials, including legislators, enjoy a common law "official immunity" from civil liability, but this immunity has never been extended to criminal prosecutions. In recognizing a legislative immunity in federal civil rights actions in *Tenney* v. *Brandhove*, 341 U.S. 367, the Court did not establish a "speech or debate" privilege for state legislators applicable in all federal cases. Instead, *Tenney* involved the traditional doctrine of official immunity (see *United States* v. *Brewster, supra*, 408 U.S. at 516 n. 10; *Doe* v. *McMillan*, 412 U.S. 306, 319 n. 13), which does not bar criminal prosecutions of government officials for violations of federal laws. In *O'Shea* v. *Littleton*, 414 U.S. 488, the Court made clear that state officials, including legislators, may be criminally liable for crimes committed while performing their official functions. "Whatever may be the case with respect to civil liability generally * * * or civil liability for willful corruption * * *, we have never held that the performance of the duties of judicial, *legislative*, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. * * * On the contrary, the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress' " (414 U.S. at 503, emphasis added; quoting from *Gravel* v. *United States*, *supra*, 408 U.S. at 627). Similarly, although state

[9]Petitioner's reliance on *National League of Cities* v. *Usery*, 426 U.S. 833, is unwarranted. That case holds that Congress may not enact legislation requiring the states, as states, to compensate almost all public employees in accordance with federal minimum wage rates. The Court did not suggest that federal criminal statutes may not be enforced against state legislators. This case involves corrupt public servants, not laws running against the states themselves.

prosecutors are immune from federal civil liability under the official immunity doctrine, that immunity

> does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242 * * *. The prosecutor would fare no better for his willful acts. [*Imbler* v. *Pachtman*, 424 U.S. 409, 429; footnotes omitted.]

There is a rational basis for extending to public officials immunity from civil liability while holding such officials answerable in criminal actions. "[C]ivil suits are easily adaptable for harassment purposes since any individual can institute a civil suit against another * * *. In contrast, * * * criminal prosecution[s] [are] initiated by government officials in solemn performance of their duties and only after * * * [indictment] by a grand jury." *United States* v. *Anzelmo*, 319 F. Supp. 1106, 1118-1119 (E.D. La.). Prosecutors also are subject to a variety of institutional restraints. See *United States* v. *Brewster, supra*, 408 U.S. at 522 n. 16. The potential for harassment of state legislators is substantially overcome by the common law immunity from civil suits; providing immunity from criminal prosecutions would yield only a small increment of protection at the cost of completely frustrating the enforcement of the laws.

Petitioner concedes that a state legislator may be prosecuted for his crimes. He nevertheless urges the Court to create an evidentiary privilege that would frustrate

successful prosecution. But the principal reason for creating a testimonial privilege for state officials would be to implement a substantive immunity from prosecution. See *United States* v. *Craig*, *supra*, 528 F. 2d at 782. If there is no substantive immunity from federal criminal prosecution for state officials, no useful purpose would be served by a federal evidentiary privilege. The creation of such a privilege would impair the ability of the federal government to protect the federal interest expressed in its criminal statutes and would thus be inconsistent with *O'Shea* and *Imbler*.

2. Petitioner contends (Pet. 22) that review should be granted because the decision here conflicts with the majority opinion in *In re Grand Jury Proceedings*, 563 F. 2d 577 (C.A. 3). The Third Circuit stated in that case that a privilege bars disclosure of evidence of "action performed in a strictly legislative capacity," *id.* at 585, but the court concluded that the privilege did not apply to the particular information sought in the challenged subpoenas. As Judge Gibbons observed (*id.* at 586), the majority's recognition of the privilege was dictum; the result of the case would have been the same had the court merely assumed *arguendo* the existence of the privilege. The United States did not seek rehearing *en banc* because the judgment was favorable. It remains to be seen whether the full Third Circuit would follow the panel's dicta, and we therefore believe that a conflict among the circuits has not been established.[10]

---

[10]Petitioner contends (Pet. 23 n. 8) that certiorari should be granted here because the United States has been avoiding appellate consideration of the evidentiary privilege issue petitione[illegible] presents. The premise of this argument is incorrect. The United States did not appeal from the partial protective order entered by the district court in *In re Grand Jury Proceedings* because that order had no significant effect on the conduct of the proceedings and there was a question

Moreover, this is not an appropriate case for this Court to consider whether there should be a doctrine of legislative privilege in federal criminal prosecutions. Petitioner DiCarlo was not compelled either by subpoena or at trial to furnish evidence relating to his official legislative duties. The evidence of legislative action introduced at trial concerned activities of public record—such as the filing and approval of the legislative order authorizing the investigation and the publication of the committee report—rather than the personal legislative conduct of the petitioner. As the court of appeals recognized, "the crime itself was entirely outside of any legislative act" and the evidence of legislative conduct "was introduced for its corroborative * * * effect" (Pet. App. 8a; footnote omitted). Indeed, the district court emphasized in its charge to the jury that it could convict petitioner DiCarlo only if it found beyond a reasonable doubt that he participated in the July 6, 1972, confrontation with McKee in New York[11] (R. 1735-1737, 1744, 1754; Pet. App. 8a n. 6), and no assertion of legislative privilege could conceivably be made concerning this confrontation. The crime with which petitioner was charged was proven by evidence of non-legislative

---

about appellate jurisdiction. After the court of appeals affirmed the portion of the district court's order that enforced the subpoenas, the subjects of the investigation entered pleas of guilty. In *United States* v. *Gillock*, W.D. Tenn., to which petitioner also refers, the United States appealed the suppression order. The court of appeals vacated the first order and remanded for entry of a more definite order (559 F. 2d 1222 (C.A. 6) (table)). On September 28, 1977, the district court entered a more definite order, and an appeal from that order is pending in the Sixth Circuit.

[11]Petitioner's summation at trial stressed this same point. Accordingly, petitioner's assertion (Pet. 38) that the prosecution was not dependent on the evidence of the July 1972 meeting is incorrect.

conduct, and the legislative action proved at trial simply explained the timing and context of the illegal, non-legislative conduct. Because the issue whether there exists a testimonial legislative privilege therefore would not be dispositive in this case, the Court should not reach the question presented in the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

SIDNEY M. GLAZER,
ELLIOTT SCHULDER,
Attorneys.

MARCH 1978.

DOJ-1978-03